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# Michael H. v. Gerald D: Upholding the Marital Presumption Against a Dual Paternity Claim

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# *Michael H. v. Gerald D*: Upholding the Marital Presumption Against a Dual Paternity Claim

In the case of *Michael H. v. Gerald D.*[1] the United States Supreme Court upheld the constitutionality of California's conclusive presumption[2] that a child born to a married woman cohabiting with her husband (who is neither impotent nor sterile) is the issue of the husband. The sharply divided Court[3] concluded that California was not required to recognize a claim of paternity asserted by a man other than the husband when the mother of the child was married to and cohabiting with the husband at the times of conception and birth and both the mother and the husband wish to raise the child as their own.

A plurality of four said that it is not unconstitutional for California to prefer the husband over the natural father as the exclusive legal father of the child and to prohibit inquiries into the paternity of a child in this situation.[4] The plurality then used a substantive due process analysis[5] to determine that the "adulterous natural father"[6] had no fundamental liberty interest in a relationship with the child.

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1. 109 S. Ct. 2333, rehearing denied, 110 S. Ct. 22 (1989).
2. Cal. Evid. Code § 621 (West Supp. 1990) states in pertinent part:
   (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.
   (b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests . . . are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.
   (c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the date of the child's birth.
   (d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.
3. 109 S. Ct. at 2336. Scalia, J., wrote for the plurality and was joined by Rehnquist, C. J., and in part by O'Connor, J., and Kennedy, J., and in part by Stevens, J., id. at 2336-46. O'Connor, J., wrote a concurring opinion in which Kennedy, J., joined, id. at 2346-47. Stevens, J., wrote a concurring opinion, id. at 2347-49. Brennan, J., writing, dissented and Marshall, J., and Blackmun, J., joined, id. at 2349-59. White, J., writing, dissented and Brennan, J., joined, id. at 2360-63.
4. Id. at 2345-46 (Scalia, J., writing, joined by Rehnquist, C.J., and joined in part by O'Connor, J., and Kennedy, J.).
5. Id. at 2336-46.
6. Id. at 2345.

The fifth Justice in the majority agreed that California may regard the husband as the exclusive legal father, but disagreed with the plurality's conclusion that a natural father never has a fundamental liberty interest "in a case like this."[7] Using a procedural due process analysis, he determined that because the natural father was allowed an adequate hearing on the issue of visitation, California had not denied the natural father procedural due process of law.

Four Justices dissented.[8] They analogized this case, which involved a child of an intact marriage of the mother to a man presumed to be the father, with cases in which the Court has favored protection of father-child relationships that began and developed when the mother was not married. They preferred to use a procedural due process analysis and would have upheld the natural father's right to establish his paternity.

*Purpose*

The purpose of this note is twofold: (1) to examine the opinions of the majority to discern how the decision in *Michael H.* affects the current status of the protection of a natural father's rights under the due process clause; and (2) to explore the extent to which the case signals a change in the Court's analysis of individual rights under the due process clause.

In Part I, this note will present summaries of the facts and the Court's opinions. In Part II, this note will show that since the decision of *Michael H.* the state need not recognize a claim to establish filiation between the child of a marital union[9] and a man other than the husband when the mother and presumed father wish to raise the child as their own. In addition, Part II of this note will show that the state may summarily deny the natural father's claim for mere visitation rights. Part III will examine the new substantive due process analysis articulated by Justice Scalia writing for the plurality. This new mode of analysis weighs state interests more heavily than that used in prior substantive due process cases. The conservative plurality used it to articulate in substantive due process terminology a preference for traditional family values despite past Court decisions that could have been read to require a different result. If the Court increasingly takes a more conservative view of the fourteenth amendment rights, this mode of analysis could see more widespread use.

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7. Id. at 2347-49 (Stevens, J., concurring).

8. Id. at 2349-59 (Brennan, J., writing, dissented and Marshall, J., and Blackmun, J., joined); id. at 2360-63 (White, J., writing, dissented and Brennan, J., joined).

9. The term "child of a marital union" will be used throughout this note to refer to a child whose legal parents were married and cohabiting during the time of the child's conception and birth.

## I. *MICHAEL H. v. GERALD D.*

*Factual Background*

Carole D. and Gerald D. were married in 1976 and lived near Los Angeles.[10] In 1978, Carole began an extramarital affair with Michael H., a neighbor. In May 1981, Carole gave birth to Victoria D. Carole's husband, Gerald, was present at the birth[11] and was named as the father on the birth certificate. Soon thereafter, however, Carole informed Michael that he could be Victoria's father.

In October 1981, Gerald left Los Angeles for New York to begin a new job. Later that month, Carole, Michael and Victoria had blood tests which showed a 98.07% probability that Michael was the father of Victoria. Over the next three year period, Carole, Victoria and Michael intermittently resided together, holding themselves out as a family during two separate time periods: first, for three months in St. Thomas, Virgin Islands, where Michael had business interests, and second, after a one-year hiatus, during which Michael filed his filiation action, for a period of eight months. For those eight months, Michael, Carole and Victoria lived in Carole's Los Angeles apartment while Gerald resided and worked in New York. During this time Carole signed a stipulation that Michael was the father of Victoria.

Michael's petition asked for a declaration of paternity, establishment of a parent-child relationship under California's enactment of the Uniform Parentage Act,[12] and a court order fixing child support and vis-

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10. 109 S. Ct. at 2337-38. The facts are taken from the text of the plurality opinion unless otherwise indicated.

11. Appellee's Brief on the Merits at 4, id. (No. 87-746).

12. Cal. Civ. Code §§ 7000-21 (West 1983 & Supp. 1990). The Uniform Parentage Act provides a method whereby a parent-child relationship may be established "regardless of the marital status of the parents." Cal. Civ. Code § 7002 (West 1983). Cal. Evid. Code § 621 (West Supp. 1990), was engrafted onto the enactment of the Uniform Parentage Act by the California legislature. A father seeking to establish a parent-child relationship under the provisions of the Act is precluded from doing so by the conclusive presumption embodied in § 621:

> Section 7004.(a) A man is presumed to be the natural father of a child if he meets the conditions as set forth in Section 621 of the Evidence Code or in any of the following paragraphs:
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> . . . .
>
> (4) He receives the child into his home and openly holds out the child as his natural child.
>
> . . . .
>
> (b) Except as provided in Section 621 of the Evidence Code, a presumption under this section is a rebuttable presumption affecting the burden of proof and may be rebutted in an appropriate action only by clear and convincing evidence.

itation.[13] Victoria's court-appointed guardian *ad litem* filed a cross complaint alleging that Victoria should be allowed to maintain relationships with both Michael and Gerald should Michael prove that he is her father. Alternatively, she sought a visitation order under California's statute providing for visitation of a non-parent.[14]

Gerald and Carole never legally separated or divorced. Carole never filed the stipulation in the filiation action; indeed, soon after signing it she, with Victoria, returned to Gerald. Gerald then intervened in the suit. He and Carole maintained that Michael's claim presented no triable issues of fact. They argued that California Civil Code section 621[15] stated a conclusive presumption as to third parties that the husband of the mother is the father of any child born during the husband's marriage to the mother. The trial court granted Gerald's motion for summary judgment, dismissing Michael's and Victoria's claims and refusing to order support payments or to make provision for permanent visitation. California's Second District Court of Appeal affirmed.[16]

California Evidence Code section 621[17] allows only the husband in a disavowal action, or the mother if the biological father acknowledges paternity to the court, to present blood test evidence that the husband is not the father of the child. On appeal of the trial court's summary judgment denying all claims, the appellate court found section 621 was constitutional using a test weighing Michael's and Victoria's interests against the interests of the state. Section 621, the court said, validly served three state interests: preservation of the integrity of the matrimonial family; protection of the child's welfare by preserving stable,

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. . . .

Section 7006.(b) Any interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under paragraph (4) of subdivision (a) of Section 7004.

Cal. Civ. Code §§ 7004, 7006 (West Supp. 1990).

13. Joint Appendix at 9-12, *Michael H.* (No. 87-746).

14. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1001-04, 1013, 236 Cal. Rptr. 810, 812-14, 820 (Ct. App. 1987).

At the time of the suit in the lower court, California's statute governing visitation of a minor child, Cal. Civ. Code § 4601, stated:

Reasonable visitation rights shall be awarded to a parent unless it is shown that the visitation would be detrimental to the best interests of the child. In the discretion of the court, reasonable visitation rights may be granted to any other person having an interest in the welfare of the child.

Cal. Civ. Code § 4601 (West 1983); 191 Cal. App. 3d at 1013 n.5, 236 Cal. Rptr. at 820 n.5.

15. For the text of Cal. Evid. Code § 621 (West Supp. 1990), see supra note 2.

16. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (Ct. App. 1987).

17. For the pertinent text of Cal. Evid. Code § 621 (West Supp. 1990), see supra note 2.

developed parent-child relationships in preference to those relationships which the legal parents oppose; and protection of a child from the social stigma of being branded the issue of an adulterous union.[18] In addition, the appellate court upheld the trial court's denial of visitation under the portion of California Civil Code section 4601 which provides that a non-parent may be awarded visitation if, in the trial court's discretion, it is in the best interest of the child.[19]

*The Issues Presented to the United States Supreme Court*

Before the U.S. Supreme Court, Michael and Victoria claimed that California's statutory scheme denied them procedural due process by denying them a particularized evidentiary hearing to establish biological paternity.[20] They also claimed that they were denied substantive due process by the lower court's application of section 621, urging that they each have a fundamental liberty interest in a relationship with the other that cannot be outweighed by the professed state interests of protecting family integrity and child welfare. Those interests, they argued, were not served by the use of section 621 in this instance, first, because actual family integrity did not exist in the Gerald-Carole-Victoria marital family due to Carole's cohabitation with Michael, and, second, because Victoria's interests could not be truly served when she was denied the right to continue her relationship with her biological father.

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18. Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1009, 1010, 236 Cal. Rptr. 810, 818, 819 (Ct. App. 1987).

19. Id. at 995, 236 Cal. Rptr. at 810. The court found, on the strength of an earlier case in which the biological father sought to overcome the marital presumption, that visitation as an "other interested person" by one who sought and failed to establish paternity is not in the best interest of the child. Compare, 191 Cal. App. 3d at 1013, 236 Cal. Rptr. at 820-21, to Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), appeal dismissed, 459 U.S. 807, 103 S. Ct. 31 (1982). See also Michelle W. v. Ronald W., 39 Cal. 3d 354, 216 Cal. Rptr. 748, 703 P.2d 88 (1985), appeal dismissed, 474 U.S. 1043, 106 S. Ct. 774 (1986) and In re Lisa R., 13 Cal. 3d 636, 119 Cal. Rptr. 475, 532 P.2d 123, cert. denied sub nom. Purzucek v. Towner, 421 U.S. 1014, 95 S. Ct. 2421 (1975). It appears that the California court determined as a matter of law that a biological father is barred by the marital presumption from establishing his paternity and may not visit the child when he is opposed by the legal parents. But see Michael H. v. Gerald D., 109 S. Ct. 2333, 2347-49 (Stevens, J., concurring). See infra text accompanying notes 73-81.

20. Michael also brought an equal protection claim which was not considered by the Court since it was neither raised nor passed upon in the lower court. The claims of Michael are set forth in the plurality opinion, Michael H. v. Gerald D., 109 S. Ct. at 2338-40. Victoria's claims are set forth in the plurality opinion. Id. at 2346. The arguments made on the issue of "actual family integrity" and Victoria's interest in establishing her parentage are found at Appellant's Brief on the Merits for Michael H. at 23-25, id. (No. 87-746), and Appellant's Brief on the Merits for Victoria D. at 41-42, id. (No. 87-746).

Victoria presented an equal protection challenge to section 621. She alleged that she ought to be afforded the same rights as her mother and her presumed father to challenge the marital presumption. California's limitation on standing to challenge the presumption was not justified, she argued, by a need to preserve family integrity.[21]

*The Plurality Opinion: A Summary*

*Michael's Claim*

The plurality treated the constitutional challenge to California Evidence Code section 621 under a substantive due process analysis. Justice Scalia pointed out that section 621, while procedural in its use in the disavowal action, serves the additional purpose of implementing the substantive legislative policy decision that a natural father may not establish his paternity of a child born during the mother's marriage to another man. Hence the Court, said the plurality, should analyze this substantive law under a substantive due process analysis.[22]

Michael's interest was found not to be a fundamental liberty interest. The plurality defined "fundamental liberty interest" to be an interest that is "not merely . . . 'fundamental' (a concept that, in isolation, is hard to objectify), but also that [is] an interest traditionally protected by our society" and "rooted in history and tradition."[23] The purpose of using tradition to determine whether a liberty interest is fundamental is "to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[24]

To ascertain whether Michael's interest should be afforded protection under the due process clause, the plurality sought to determine "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society."[25] The plurality found that nothing in the sources consulted nor any evidence to which it resorted

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21. The text presents the plurality's characterizations of Victoria's equal protection claim. Victoria made other equal protection arguments as well. She alleged that § 621 creates unfair classifications based upon marital status and gender: she was denied the right afforded to other natural (or illegitimate) children to establish biological paternity because her female parent was married to a man other than her father. These classifications, argued Victoria, are not supported by the state interest in family integrity. Appellant's Brief on the Merits for Victoria D. at 31-41, 109 S. Ct. 2333 (No. 87-746); Appellant's Reply Brief for Victoria D. at 3-4, id. The plurality stated that Victoria is not illegitimate. 109 S. Ct. at 2346.

22. 109 S. Ct. at 2340-41.

23. Id. at 2341-42.

24. Id. at 2341 n.2.

25. Id. at 2342.

> address[es] *specifically* the power of the natural father to assert parental rights over a child born into a woman's existing marriage with another man. Since it is Michael's burden to establish that such a power (at least where the natural father has established a relationship with the child) is so deeply embedded within our traditions as to be fundamental, the lack of evidence alone might defeat his case. But . . . even in modern times . . . the ability of a person in Michael's position to claim paternity has not been generally acknowledged.[26]

Because a declaration of paternity alone has no legal consequences, said the plurality, Michael must show that society has traditionally given those like him substantive parental rights, or at least has not denied them. No states have granted substantive parental prerogatives to persons in Michael's position, said the plurality. Even though some states have granted the "natural father" who has *not* established a relationship with the child the "theoretical power" to rebut the marital presumption,

> [w]hat counts is whether the States in fact award substantive parental rights to the *natural father of a child conceived within and born into an extant marital union that wishes to embrace the child.* We are not aware of a single case, old or new, that has done so. This is not the stuff of which fundamental rights qualifying as liberty interests are made.[27]

The sources used by the plurality to identify relevant historical traditions protected by our society were the common law texts of Bracton, Blackstone, Schouler, and others dated from the sixteenth to the nineteenth centuries, as well as a 1957 American Law Reports Note on the state laws that limited standing to overcome the marital presumption.[28] The plurality found no societal protection therein for any standing that Michael might have to assert his paternity. This, together with a failure to find a "single case, old or new,"[29] granting someone like Michael substantive parental rights, led to the conclusion that Michael's interest had no societal protection in our nation's historical traditions. The plurality concluded that Michael's interest was not a fundamental liberty interest.

The plurality also concluded that the legal, marital father is entitled to constitutional protection as the exclusive father of Victoria.[30] The plurality noted that the sources it used to determine the nonexistence

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26. Id. at 2343 (emphasis added).
27. Id. at 2344 (emphasis added).
28. Id. at 2342-43.
29. Id. at 2344.
30. Id. at 2345-46.

of Michael's interest also revealed the justifications for the conclusiveness of the state imposed presumption in favor of Gerald: to protect the child from stigma and to promote peace within the marital family. Even since relaxation of rigid state protection for the marital family, the plurality said, "our traditions have protected the marital family (Gerald, Carole and the children they acknowledge to be theirs) against the sort of claim Michael asserts."[31] This goal of protection of the marital family, said the plurality, is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate.[32] Of the fact that section 621 permits the husband or the wife in some instances to prove that the child is not the husband's,[33] the plurality said that when the husband is impotent or sterile, or when the couple has not been cohabiting, it is "less likely that the paternity hearing will disrupt an otherwise harmonious and apparently exclusive marital relationship."[34]

The plurality said that its result is not inconsistent with earlier decisions on the rights of natural fathers. Those decisions, stated the plurality, rest on the historical respect for relationships that develop within the unitary family.[35] To remain consistent with those decisions, said the plurality, the Court must treat Michael's claim in its context as a competing claim against that of Gerald, the legal father, for exclusive paternity of Victoria.[36] The plurality observed that the necessary choice between the two conflicting claims is validly left to the California legislature.[37]

In footnote six of the plurality opinion, from which Justices O'Connor and Kennedy dissented, Justice Scalia elaborated on the plurality's methodology. He described the methodology as "using historical traditions specifically relating to the rights of an adulterous natural father rather than inquiring more generally 'whether parenthood is an interest that historically has received our attention and protection.'"[38] He defended the method of referring to the asserted interest at the most specific level at which a relevant tradition protecting (or denying protection to) the right may be identified. Only if no tradition could be identified for the treatment of the "adulterous natural father," reasoned

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31. Id. at 2342.

32. Id. at 2340-46.

33. Cal. Evid. Code § 621 (West Supp. 1990). See supra note 2 for the pertinent text of this statute.

34. 109 S. Ct. at 2340 n.1.

35. Id. at 2342.

36. Id. at 2342 n.4, 2345, noting that California has no provision for dual paternity, and stating, "Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father."

37. Id. at 2345-46.

38. Id. at 2344 n.6 (plurality opinion).

Justice Scalia, should the Court analogize such a person's liberty interest with that of natural fathers in general. A reference to tradition, in the most precise terms possible, states footnote six, ensures that the Court will not be guilty of arbitrary decision-making in the area of substantive due process.

In footnote six, Justice Scalia cited two decisions, *Roe v. Wade*[39] and *Bowers v. Hardwick*,[40] that support consulting the current state law governing the asserted liberty interest at hand in order to see if the interest is protected.[41] The approach is not inconsistent with *Griswold v. Connecticut*[42] or *Eisenstadt v. Baird*,[43] remarked Justice Scalia, since neither of these cases "acknowledged a longstanding and still extant societal tradition withholding the very right pronounced to be the subject of a liberty interest and then rejected it."[44]

Justices O'Connor and Kennedy dissented from footnote six. Of the alleged use of the methodology in the past, Justice O'Connor wrote, "On occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be 'the most specific level' available."[45] Of the future applicability of the plurality's mode of analysis, she said that she "would not foreclose the unanticipated by the prior imposition of a single mode of historical analysis" that is not necessarily the one used in the Court's past decisions.[46]

*Victoria's Claim*

The plurality found that Victoria had no due process right to maintain filial relationships with both Michael and Gerald. For the same reasons and under the same analysis set forth by the plurality with regard to Michael's claim, Victoria's claim also failed. History and tradition do not recognize dual paternity, observed the plurality, and likewise they do not recognize a child's interest in her relationship with a natural father when she has a legal father.[47]

The plurality also disposed of Victoria's equal protection challenge in summary fashion. Applying rational scrutiny, the plurality said that the state's legitimate interest in the integrity of the marital family justified treating Victoria differently from her parents in denying her, but not them, the chance to overcome the marital presumption. Strict scrutiny

39. 410 U.S. 113, 93 S. Ct. 705 (1973).
40. 478 U.S. 186, 106 S. Ct. 2841 (1986).
41. 109 S. Ct. at 2344 n.6.
42. 381 U.S. 479, 85 S. Ct. 1678 (1965).
43. 405 U.S. 438, 92 S. Ct. 1029 (1972).
44. 109 S. Ct. at 2344-45 n.6.
45. Id. at 2346 (O'Connor, J., concurring).
46. Id. at 2347 (O'Connor, J., concurring).
47. Id. at 2346.

should not be used to determine if Victoria was treated differently "on the basis of her illegitimacy."[48] "Illegitimacy is a legal construct, not a natural trait. Under California law, Victoria is not illegitimate, and she is treated in the same manner as all other legitimate children: she is entitled to maintain a filial relationship with her legal parents."[49]

*Justice Stevens' Opinion: A Summary*

Justice Stevens, concurring and writing separately, agreed with the plurality that, inasmuch as no substantive legal rights come with a mere declaration of paternity, the state has no obligation to make such a declaration.[50] Michael's interest, however, said Stevens, is strong enough to give him a "constitutional right to try to convince a trial judge that Victoria's best interests would be served by granting him visitation rights."[51] In Stevens' view, the California court gave him that right, and the trial judge validly denied visitation:

> Under the circumstances of the case before us, Michael was given a fair opportunity to show that he is Victoria's natural father, that he had developed a relationship with her, and that her interests would be served by granting him visitation rights. On the other hand, the record also shows that after its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with a loving and harmonious family home. . . . I find nothing fundamentally unfair about the exercise of a judge's discretion that, in the end, allows the mother to decide whether her child's best interest would be served by allowing the natural father visitation privileges. Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the Due Process Clause of the Fourteenth Amendment.[52]

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48. Id.

49. Id. A detailed analysis of the Court's handling of Victoria's claim is beyond the scope of this note. It should be noted that the plurality's characterization of Victoria's equal protection claim is not necessarily complete. The plurality did not consider Victoria's claim that she was denied protection equal to that given to children whose mothers were not married at the time of conception and birth. See supra note 21.

50. Id. at 2347.

51. Id.

52. Id. at 2348-49 (Stevens, J., concurring). See supra note 19; see infra text accompanying notes 73-81.

*The Dissenting Opinions: A Summary*

The dissenters stated that proper substantive due process analysis required, first, that the court identify Michael's interest as that of a natural father in his relationship with his child and, second, that it determine by analogy with the court's previous decisions on natural fathers' rights whether Michael's interest warranted protection.[53] They would have, however, used procedural due process analysis. They concluded that, because under prior decisions on natural fathers' rights Michael's interest warranted protection, and because the state interest in protecting family integrity and preventing social stigma is small when the husband already knows of the natural father's claim, California's refusal to allow Michael to establish paternity was a violation of procedural due process.[54]

## II. Analysis of the Majority's Denial of the Natural Father's Claim

*Michael H.* could be read to hold that states need not recognize a claim to establish filiation between the child of a marital union[55] and a man other than the husband when the mother and presumed father wish to raise the child as their own. The plurality opinion clearly supports this proposition.[56] On the other hand, *Michael H.* could require that the natural father be allowed a hearing for the purpose of establishing visitation. The answer depends upon how one reads the opinion of Justice Stevens.

Justice Stevens' opinion was based upon a misperception of the issues before the Court and of the operation of California law on the right to visitation.[57] The extent to which Justice Stevens actually concurred in the plurality's denial of Michael's claim is questionable.

The opinions will be analyzed in turn in order to demonstrate that, ultimately, Justice Stevens supports the proposition that the State may summarily deny the claim of the natural father seeking to establish paternity or visitation of the child of a marital union when the legal parents oppose the claim.[58]

*The Plurality Opinion: An Analysis*

A substantive due process analysis involves a balancing test for deciding whether a state may place limits on individual liberty. It requires

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53. Id. at 2349-59 (Brennan, J., writing, joined by Blackmun, J., and Marshall, J.); id. at 2360 (White, J., writing, joined by Brennan, J.).

54. Id.

55. See supra note 9.

56. See infra text accompanying notes 59-72.

57. See infra text accompanying notes 73-83.

58. See infra text accompanying notes 82-83.

the identification of a liberty interest, an evaluation of the interest to determine whether the interest is fundamental or "implicit in the concept of ordered liberty,"[59] the identification of the state's interest sought to be accomplished by the challenged rule of law, and a weighing process to determine if the state interest is sufficiently important to justify the rule's limitation upon the individual's liberty.[60] In *Michael H.*, the plurality arrived at a two-pronged conclusion. First, it concluded that the natural father of a child conceived and born during the marriage of the mother to another man has no fundamental liberty interest in his relationship with the child when the mother and her husband wish to raise the child as their own.[61] It also concluded that California's interest in family integrity and privacy justified its preference for the marital father over the natural father as exclusive father of Victoria.[62] It disclaimed any effort to independently balance the state interest against the asserted individual liberty. Instead, it concluded that society had already balanced the two and had favored the state interest.[63]

The plurality observed that all parental prerogatives would be granted to Michael by California law if he established that he is Victoria's father. Gerald was already the father, it noted, and under California law Victoria could have only one father. California may determine for itself whether to grant Gerald or Michael paternal status.[64]

The plurality noted that California does not provide for dual paternity. This is true because of the existence of section 621's conclusive presumption of the husband's paternity, the constitutionality of which *Michael H.* purported to test.[65] Gerald was not necessarily at risk of losing all parental rights to Michael; he was at risk of losing the exclusivity of his paternal status, which the Court couched in terms of "family integrity and privacy." "Family integrity" is Gerald's freedom to continue as Victoria's only father for as long as he wishes[66] and his freedom from inquiries into the paternity of the child conceived by and

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59. Palko v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 151 (1937).

60. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965).

61. Michael H. v. Gerald D., 109 S. Ct. 2333, 2344-46 (1989).

62. Id. at 2345-46.

63. Id. at 2345 n.7. For a discussion of the methodology the plurality used to reach this conclusion, see infra text accompanying notes 89-114.

64. Id.

65. See supra note 12. See also Michelle W. v. Ronald W., 39 Cal. 3d 354, 703 P.2d 88, 216 Cal. Rptr. 758 (1985) appeal dism'd, 474 U.S. 1043, 106 S. Ct. 774 (1986) (denying paternity claim of natural father who, after legal parents' divorce, had married mother, where legal father wished to continue to act as father and opposed paternity claim).

66. See 109 S. Ct. at 2345 n.7 where the plurality says it might reach a different result when the marital parents do not wish to raise the child as their own.

born to his wife during their marriage.[67] Family integrity is antithetical to recognition of any paternity claim other than the husband's. The historic tradition of protection of family integrity was sufficient justification for the plurality both to deny the existence of Michael's asserted fundamental liberty interest and to recognize the state's right to maintain an exclusive paternity regime that favors the husband.[68]

The plurality's use of family integrity refers to legal integrity of the marital family. The plurality did not consider the fact that Gerald's family had been factually impugned when Carole and Michael had sexual relations and when Carole, Michael, and Victoria lived together as a family. It did not question the husband's, nor the natural father's, personal commitment to fatherhood. At the same time, it took into account the adulterous origin of Michael's *de facto* relationship to Victoria. It determined that Michael's and Victoria's relationship had not been treated as a protected family unit under our historic practices.[69]

The *Michael H.* plurality's use of the family as the focus of analysis is a departure from the Court's prior treatment of natural fathers' rights. Before *Michael H.*, the Court had developed a test that focused on the biological link and the actual personal relationship between the natural father and child rather than on the family unit.[70] The biological link was a threshold requirement to establish parental rights. In cases where the natural father prevailed, the determinative factor was the extent of the demonstrated commitment of the father to act as parent to the child.[71]

The critical distinction between those cases and *Michael H.* is that none of those cases involved a mother who was married at the time of conception and birth. The significance of this distinction is that when the mother is married, the natural father's interest in the relationship with the child is pitted against the legal father's interest in freedom

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67. 109 S. Ct. 2342-43, 2345 n.7; see supra text accompanying notes 30-34.

68. The plurality observed, but did not decide, that non-marital, "unitary" families might also deserve constitutional protection. 109 S. Ct. at 2342 n.3. Those included as "unitary" are the "household(s)" of unmarried parents and their children; excluded is the relationship "between a married woman, her lover and their child, during a 3-month sojourn in St. Thomas, or during a subsequent 8-month period, when, if he happened to be in Los Angeles, he stayed with her and the child." Id.

69. The plurality stated that it could not ignore the circumstances of the conception of the child because to do so would lead to the conclusion "that if Michael had begotten Victoria by a rape, that fact would in no way affect his possession of a liberty interest in his relationship with her." 109 S. Ct. at 2342 n.4.

70. E.g., Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983); Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979); Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549 (1978); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).

71. Buchanan, The Constitutional Rights of Unwed Fathers Before and After *Lehr v. Robertson*, 45 Ohio State L.J. 313, 319-24 (1984).

from intrusions into his legal family. The *Michael H.* plurality cited an earlier opinion by Justice Stevens in which the Court denied a natural father the right to veto adoption by the mother's new husband. The plurality highlighted the distinction presented by the marriage:

> [A]lthough in some circumstances the actual relationship between father and child may suffice to create in the unwed father parental interests comparable to those of the married father, *the absence of a legal tie with the mother* may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist.[72]

Before *Michael H.*, the Court considered the extent of the factual commitment of the natural father. Now, under the plurality's disposition, to the extent that Justice Stevens concurred in that disposition, the presence of the marriage tie of the mother to another man at the times of conception and birth and the married couple's opposition to the natural father's claim may be the basis for denial of any claim based on a *de facto* relationship between the natural father and the child. In the instance of an intact marriage, the state may ignore what might have been a protected constitutional right of the natural father if the mother had not been married. To protect the husband's constitutional right to remain exclusive legal father, it is permissable, as a legislative policy choice, to limit the natural father's constitutional right.

*Justice Stevens' Opinion: An Analysis*

The extent to which Justice Stevens, who formed the majority with his concurring opinion, actually agrees with the plurality is unclear. First he stated: "I agree with Justice Scalia that the Federal Constitution imposes no obligation upon a State to 'declare facts unless some legal consequence hinges upon the requested declaration.'"[73] Justice Stevens did not question the extent of the state's power to create or withhold those "legal consequences."

Yet Justice Stevens went on to a second issue: "Does the California statute deny appellants a fair opportunity to prove that Victoria's best interests would be served by granting Michael *visitation rights*?"[74] He answered first by assuming that "Michael's relationship with Victoria is strong enough to give him a constitutional right to try to convince a trial judge that Victoria's best interest would be served by granting

72. 109 S. Ct. at 2345, quoting Lehr v. Robertson, 463 U.S. 248, 260 n.16, 103 S. Ct. 2985, 2993 n.16 (1983) (citations omitted).

73. Michael H. v. Gerald D., 109 S. Ct. 2333, 2347 (1989) (Stevens, J., concurring).

74. Id. (emphasis added).

him visitation rights.''[75] Then he concluded that California's statutory scheme gave Michael that right:

> Because I am convinced that the trial judge had the authority under state law both to hear Michael's plea for visitation rights and to grant him such rights if Victoria's best interests so warranted, I am satisfied that the California statutory scheme is consistent with the Due Process Clause of the Fourteenth Amendment.[76]

Justice Stevens' perception that Michael was afforded a particularized hearing on visitation is not well-founded. Michael did not seek mere visitation rights. He sought a declaration of paternity and consequent entitlement to a presumption that he be allowed visitation as a parent. Only Victoria sought, as alternative relief, visitation rights under the clause of California's visitation law[77] that provides for the trial judge's use of discretion in granting visitation to non-parents after a determination of the child's best interests. The trial court determined on the basis of an earlier case that as a matter of law no visitation should be awarded to anyone asserting paternity when the married parents oppose the claim.[78] Justice Stevens, alone among the Justices, disagreed that the trial court ruled in this summary way. He decided that the trial court denied visitation after particularized findings on factors that were considered in the Court's decisions on unwed fathers' rights: biological link, developed relationship, and best interest factors such as the natural father's length of residence with the child and mother and the child's ability to cope with having two fathers.[79] In addition, he read the record to reflect that "after its rather shaky start, the marriage between Carole and Gerald developed a stability that now provides Victoria with a loving and harmonious family home.''[80] Contrary to Justice Stevens' suggestion, none of the factors he named—biological link, actual relationship, the best interests of Victoria, and the stability of the marriage—were issues of fact in the trial court.[81] The trial court granted summary judgment

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75. Id.; see supra text accompanying note 52.

76. Id. at 2348-49.

77. Cal. Civ. Code § 4601 (West 1983); see supra note 14.

78. See Cal. Civ. Code § 4601 (West 1983). Compare 109 S. Ct. at 2347-48 (Stevens, J., concurring); id. at 2356 (Brennan, J., dissenting); Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (Ct. App. 1987); Vincent B. v. Joan R., 126 Cal. App. 3d 619, 179 Cal. Rptr. 9 (1981), appeal dismissed, 459 U.S. 807, 103 S. Ct. 31 (1982); In re Lisa R., 13 Cal. 3d 636, 119 Cal. Rptr. 475, 532 P.2d 123, cert. denied sub nom. Porzucek v. Towner, 421 U.S. 1014, 95 S. Ct. 2421 (1975).

79. 109 S. Ct. at 2347-48.

80. Id. at 2348.

81. The record contained evidence bearing on the issue of pendente lite visitation, which was awarded and then terminated by the trial court. See Michael H. v. Gerald D., 191 Cal. App. 3d 995, 236 Cal. Rptr. 810 (Ct. App. 1987).

dismissing claims for a paternity declaration and permanent visitation.

Justice Stevens' opinion could be read to require that one claiming paternity against opposing legal parents be allowed to establish paternity for the limited purpose of obtaining visitation. Under this reading, the marital family integrity and privacy so important to the plurality could be destroyed since the award of visitation would be based on a showing of biological link, *de facto* relationship, and a failure of the married couple to maintain the requisite stability of family home life.

Justice Stevens' opinion read in light of his other opinions in unwed fathers' cases, however, shows that he would seldom, if ever, support an award of visitation when the legal parents oppose the claim. First, in *Michael H.*, the stability of the marital union between the presumed father and the mother and their ability to provide the child with a loving home was enough to justify, for Justice Stevens, the trial court's ruling denying a visitation claim which the mother opposed. In another case denying the unwed father's right to veto his child's adoption, Justice Stevens said:

> [H]ere we are concerned with the rights the unwed father may have when his wishes and those of the mother are in conflict, and the child's best interests are served by a resolution in favor of the mother. It seems to me that the absence of a legal tie with the mother may in such circumstances appropriately place a limit on whatever substantive constitutional claims might otherwise exist by virtue of the father's actual relationship with the children.[82]

Dissenting in a third case from a holding that struck down an adoption by the mother's new husband that had taken place over the natural father's veto, Justice Stevens said:

> Although some Members of the Court have concluded that greater protection is due the "private realm of *family* life," this appeal does not fall within that realm because whatever family life once surrounded [the natural father], his children and [the mother] has long since dissolved through no fault of the State's. In fact, it is the State, rather than the [natural father], that may rely in this case on the importance of the family insofar as it is the state that is attempting to foster the establishment and privacy of new and legitimate adoptive families.[83]

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82. Lehr v. Robertson, 463 U.S. 248, 261-62 n.16, 103 S. Ct. 2985, 2992-93 n.16 (1983) (citing dissent by Stewart, J., Caban v. Mohammed, 441 U.S. 380, 397, 99 S. Ct. 1760, 1771 (1979)).

83. Caban v. Mohammed, 441 U.S. 380, 414 n.27, 99 S. Ct. 1760, 1779 n.27 (1979) (Stevens, J., dissenting) (citations omitted).

Even though Justice Stevens has stated that a constitutional right *might* exist, he has never found for the natural father. In *Michael H.*, his vague references to the stability of home life and the child's best interests shed no light on what, if any, specific factors he would require to support denial of the natural father's claim other than the existence of a cohabiting, state-sanctioned family unit which opposes the claim. He concluded that *assuming* an interest existed, it was adequately protected through a hearing that, in truth, never took place, and was validly denied on the basis of facts which, in truth, were not established in the trial court.

The most that can be said is that Justice Stevens favors the parental relationships that arise in the context of a legitimate family over *de facto* relationships which the legal parents oppose. Hence, his concurrence in *Michael H.* might not require an evidentiary hearing at all, but only a summary judgment based on the opposition of the legal parents. Any evidentiary hearing on visitation when the legal parents oppose the claim would be pointless.

In summary, close analysis of the concurring opinion by Justice Stevens raises a serious question regarding whether the state may always deny the natural father a right to establish his paternity of a child conceived and born during the mother's marriage to another man when she and the presumed father oppose the paternity claim. If, however, Justice Stevens' concurrence is read in light of his other opinions on natural fathers' rights, his willingness to allow the state to deny such a claim summarily is clear.

Even assuming that *Michael H.* supports the proposition that a natural father's claim for paternity or visitation may be summarily denied when opposed by the legal parents, for the denial of the natural father's claim only under the facts of *Michael H.*, another question arises. First, are families with divorced legal parents who wish to raise the child jointly entitled to state protection against a paternity claim? Justice Scalia referred to the situation in which "the husband and wife wish to raise her child jointly."[84] Because divorce does not change legal parental status, the parents who are divorced at the time of the claim could come within the state's protection. They, with their legal children, form a family traditional enough in character to satisfy the plurality. If the legal parents show that the claim intrudes upon their life as a family (albeit a family that is not cohabiting), the plurality would probably not require recognition of the claim. Since they form a "legitimate family," Justice Stevens' requirement would be satisfied. In the instance of the family with divorced legal parents, then the wish of the legal parents to raise the child jointly and the state's traditional rec-

84. Id. at 2345 n.7.

ognition of such a family as a legitimate family would entitle that family to protection from a paternity claim by another man.

## III. The Use of Positive Law Sources in Substantive Due Process Analysis

The plurality's conclusion that Michael had no fundamental liberty interest was founded on positive law sources.[85] For the plurality, a fundamental liberty interest must be an interest traditionally protected by society and recognized as such by the sources used by the Court. The sources first used by the plurality were legal and historical texts dating from the sixteenth century, the most recent of which was a 1957 Note of the American Law Reports. These sources revealed that interests like Michael's had been expressly denied. The plurality then required that Michael prove that his interest is "so deeply embedded within our traditions as to be a fundamental right" by proving by case or statutory law that substantive legal rights, and not merely the procedural right to a hearing, had previously been afforded to persons in his situation. Even though state law enactments exist today that would "theoretically"[86] give Michael the right he claimed, those did not establish for the plurality that Michael had a fundamental liberty interest.

This method of determining the nature of the liberty interest stands in stark contrast to the approach used in prior due process cases where the right asserted was analogized to other rights already recognized by the Court to determine the existence of a liberty interest.[87]

### *Discovering the Parent's Interest Before and Since* Michael H.

Prior cases discussing the rights arising from family relationships include decisions on the right of a natural father to be afforded a hearing before his parental rights are terminated,[88] the right of foster families to procedural safeguards before their *de facto* relationships with foster children are terminated,[89] the right of a mother to sue for the

85. See supra text accompanying notes 25-44.

86. Michael H. v. Gerald D., 109 S. Ct. 2333, 2344 (1989); see supra text accompanying note 27.

87. See, e.g., Moore v. East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094 (1977); Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973); Eisenstadt v. Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972); Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965).

88. Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985 (1983); Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760 (1979); Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549 (1978); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).

89. See Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094 (1977).

wrongful death of her out-of-wedlock child,[90] the right of out-of-wedlock children to be treated equally with children of married parents,[91] the right of extended family members to reside together,[92] and the right of parents to a showing of clear and convincing evidence before their parental rights are terminated.[93] None of these cases searched sources of positive law to conclude that the interest at stake was worthy of protection. On the contrary, the origins of parental rights have not been found in statutes, as are property rights; rather, they have been thought to exist, as a matter of natural right,[94] as concomitants to parental responsibility.[95]

Only one prior case utilized a search of the positive law as the foundation for reaching the conclusion that the liberty interest at stake was or was not a fundamental one. In *Bowers v. Hardwick*, where the plurality characterized the interest specifically as "a right to commit homosexual sodomy," state laws criminalizing sodomy were listed, and the interest was distinguished from those involving marriage, family and procreation. The Court concluded that calling that interest fundamental would be "at best, facetious."[96]

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90. See Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 88 S. Ct. 1515 (1968).

91. See Weber v. Aetna Casualty and Surety Co., 406 U.S. 164, 92 S. Ct. 1400 (1972); see also Gomez v. Perez, 409 U.S. 535, 93 S. Ct. 872 (1973).

92. See Moore v. City of East Cleveland, 431 U.S. 494, 97 S. Ct. 1932 (1977).

93. See Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982).

94. E.g., Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094 (1977) (the natural rights of parents find their roots in, and thus, their contours must be sought from an examination of, "intrinsic human right" while the rights of foster families arise from, and their contours must be sought in, state law and contractual sources). The Court has declared that it is "'plain beyond the need for multiple citation that a natural parent's desire for and right to the companionship, care, custody and management of his or her children is an interest' far more precious than any property right." Santosky v. Kramer, 455 U.S. 745, 759, 102 S. Ct. 1388, 1397 (1982) (quoting Lassiter v. Department of Social Serv. of Durham City, 452 U.S. 18, 101 S. Ct. 2153 (1981)) (citations omitted).

95. Parents "have the right, coupled with the high duty," Pierce v. Society of Sisters, 268 U.S. 510, 535, 45 S. Ct. 571, 573 (1925), to recognize and prepare their children "for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166, 64 S. Ct. 438, 442 (1944). "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life." Meyer v. Nebraska, 262 U.S. 390, 400, 43 S. Ct. 625, 627 (1923). The importance of a family relationship "stems from the emotional attachments that derive from the role it plays in promoting a way of life through the instruction of children as well as from the fact of blood relationship." Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 844, 97 S. Ct. 2094, 2109 (1977) (citations omitted). See generally Lehr v. Robertson, 463 U.S. 248, 258, 103 S. Ct. 2985, 2991 (1983); Santosky v. Kramer, 445 U.S. 745, 759, 102 S. Ct. 1388, 1397 (1982); Buchanan, supra note 71, at 319-24.

96. Bowers v. Hardwick, 478 U.S. 186, 194, 106 S. Ct. 2841, 2846 (1986).

In footnote six[97] of the *Michael H.* plurality opinion, from which two members of the plurality dissented, Justice Scalia elaborated on the methodology used to determine objectively the existence of a liberty interest. He pointed out that *Roe v. Wade*[98] also involved a survey of state law cited to support the conclusion that there was no longstanding tradition of laws proscribing abortion.

Contrary to Justice Scalia's suggestion, *Roe*'s review of the history of abortion practices and its notation of the fact that the state laws proscribing abortion were only of recent origin were not used in support of the existence of the interest at stake there. In *Roe*, the determination of the fundamental liberty interest was made after detailed review of and analogy with the decisions of the Court that have borne on the fundamental right of privacy.[99] The *Michael H.* plurality did not engage in the kind of analysis used in *Roe* to determine the existence of the fundamental liberty interest. Rather, it first examined the positive law sources for protection of Michael's right, specifically described as the right of an adulterous natural father as distinguished from the right of a parent. Only after concluding that the sources examined provided no protection, the plurality compared its result to the Court's decisions on the rights of unwed natural fathers.[100] Observing that *Michael H.* is unique in that the natural father's right directly conflicts with those rights arising from the husband's designation as legal father, the plurality returned to the theme of states' rights and concluded that "[i]t is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted."[101]

In the process of selecting the sources of evidence of tradition, the plurality rejected current statutes and cases[102] granting the procedural right to establish paternity. At the same time, it accepted the 1957

97. Michael H. v. Gerald D., 109 S. Ct. 2333, 2344-45 n.6 (1989).

98. Roe v. Wade, 410 U.S. 113, 93 S. Ct. 705 (1973).

99. Id. at 153-55, 93 S. Ct. at 726-27.

100. 109 S. Ct. at 2345; see supra text accompanying notes 35-37 and 70-72.

101. 109 S. Ct. at 2345.

102. See supra text accompanying note 27. See Uniform Parentage Act 9B U.L.A. 287 (1987). The Uniform Parentage Act was drafted in answer to problems of enforcement of parental obligations to illegitimate children. Id. (official comments). It purports to mandate like treatment of all children and parents regardless of marital status of the parents. Id. at 296, § 2. It entitles all persons to establish a parent-child relationship, which is defined as "the legal relationship existing between a child and his natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties and obligations." Id. at 296, § 1.

Of 18 states enacting the Uniform Parentage Act, 15 states have enacted variations of the act granting the right of action to establish paternity either to any father who has lived with the child and held it out as his own, or to anyone alleging himself to be the

American Law Reports Note on the state laws that limited standing to overcome the marital presumption.[103] According to the plurality, current statutes and cases show merely the "theoretical power"[104] granted by the states to a natural father to rebut the marital presumption. The fact that there were no statutes or cases actually granting substantive parental rights to such a person supported the plurality's conclusion that there was no fundamental right in this case.

The plurality's rejection of these statutes and cases as evidence of tradition results in an inconsistency in the plurality opinion. Justice Scalia had written that California's conclusive presumption of paternity,

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father, or to any interested person. See Ala. Code §§ 26-17-1 to 26-17-21 (1986) (but see Ex parte Presse, 554 So. 2d 406 (Ala. 1989) (denying standing to the biological father now married to the mother, where the time has passed for the husband to disavow and where the husband has continually supported the child and opposes the claim)); Colo. Rev. Stat. §§ 19-6-101 to 19-6-129 (1986); see also R. McG. v. J.W., 615 P.2d 666 (Colo. 1980); Del. Code Ann. tit. 13, §§ 801-818 (Supp. 1988) (see also In re Evans, No. 38, 266, 85-1-34-CV (Del. Fam. Ct. Feb. 23, 1988) (1988 WL 26784); Green v. Long, 547 A.2d 630 (Del. Fam. Ct. 1988)); Haw. Rev. Stat. §§ 584-1 to 584-26 (1988 & Supp. 1989); Ill. Ann. Stat. ch. 40, para. 2501-26 (Smith Hurd Supp. 1989); Kan. Stat. Ann. §§ 38-1110 to 38-1129 (1986); Minn. Stat. §§ 257.51-.74 (Supp. 1990); Mont. Code Ann. §§ 40-6-101 to 40-6-135 (1989); Nev. Rev. Stat. §§ 126.011-.391 (1987); N.J. Stat. Ann. §§ 9:17-38 to 17-59 (West 1976); N.M. Stat. Ann. §§ 40-11-1 to 40-11-23 (1986 Rplcmt.); N.D. Cent. Code §§ 14-17-01 to 14-17-26 (1981 & Supp. 1989); Ohio Rev. Code Ann. §§ 3111.01-.19 (Anderson 1989) (see also Hulett v. Hulett, 45 Ohio 3d 288, 544 N.E.2d 257 (1989)); Wash. Rev. Code Ann. §§ 26.26.010-.26.905 (1986); Wyo. Stat. §§ 14-2-101 to 14-2-120 (1986 & Supp. 1988) (but see A. v. X., Y., and Z., 641 P.2d 1222 (Wyo. 1982), cert. denied, 459 U.S. 1021, 103 S. Ct. 388 (barring natural father from overcoming the marital presumption)).

In Alabama and Wyoming the courts refused to interpret the statute as allowing the natural father to rebut the marital presumption. Most of the enactments remain untested on the issue. Conversely, at least three states' courts have expressly granted to the natural father a right of action to rebut the marital presumption when the mother is married. R. McG. v. J.W., 200 Colo. 345, 615 P.2d 666, 670-72 (1980); In re Evans, No. 38, 266, 85-1-34-CV (Del. Fam. Ct. Feb. 23, 1988) (1988 WL 26784); Green v. Long, 547 A.2d 630 (Del. Fam. Ct. 1988); Finnerty v. Boyett, 469 So. 2d 287 (La. App. 2d Cir. 1985). See also Smith v. Cole, 553 So. 2d 847 (La. 1989) (citing Finnerty v. Boyett with approval). Five others have granted the right of action to the natural father or the child after the mother's divorce even though the action is opposed by the ex-husband. See Van Nostrand v. Olivieri, 427 So. 2d 374 (Fla. Dist. Ct. App. 1983); Simcox by and through Dear v. Simcox, 175 Ill. App. 3d 473, 529 N.E.2d 1032 (App. Ct. 1988), aff'd in part and vacated in part; Simcox v. Simcox, 131 Ill. 2d 491, 546 N.E. 2d 609 (1989); A. B. v. C. D., 150 Ind. App. 535, 277 N.E. 599 (Ct. App. 1971); Hulett v. Hulett, 45 Ohio 3d 288, 544 N.E. 2d 257 (1989); Joseph v. Alexander, 12 Ohio 3d 88, 465 N.E. 2d 448 (1984); McDaniels v. Carlson, 108 Wash. 2d 299, 738 P.2d 254 (1987). Since *Michael H.*, the Louisiana Supreme Court concluded that under Louisiana filiation and support statutes a child has a right of action for support against a natural father where the child was presumed to be the issue of another man. Smith v. Cole, 553 So. 2d 847 (La. 1989).

103. See supra text accompanying note 27.

104. 109 S. Ct. at 2344.

by serving as a procedural bar to Michael's claim, served the policy of denying Michael substantive rights.[105] Yet the plurality refused to recognize other states' currently enacted grants of the right of action as evidence of society's intent to grant substantive parental rights. At the same time, the 1957 American Law Reports Note showing that states limited standing to overcome the marital presumption could serve as evidence of society's intent to withhold substantive parental rights.

One explanation for the rejection of the current cases and statutes is that they are too new to be considered as evidence of tradition. Justice Scalia's use of the *Roe* analogy,[106] where he cited *Roe* as a rejection of recently enacted abortion laws in a search for tradition, bears out this explanation. Justice Scalia sought to use old, and to reject new, positive law sources as evidence of tradition, where the old and new were different. In addition, the recent statutes and cases granting the procedural right do not reflect sufficient time-tested acceptance by legislative majorities to justify their use as evidence of the plurality's notion of tradition.[107] Notably, in *Michael H.*, some of the new sources that granted the procedural right rested upon United States Supreme Court cases on natural fathers' rights.[108] Justice Scalia's method of selecting sources of tradition weeded out those sources that had their origins in the cases which the plurality sought to limit.[109]

In summary, the mode of substantive due process analysis used by the plurality was a way to articulate the plurality's preference for traditional legal family relationships in the face of the United States Supreme Court precedents that favored recognition of *de facto* parental relationships in a case of conflict between the two types of relationships. Even though only two Justices committed to use of the mode of analysis in the future, recognition of the plurality's methods should be useful to the litigant in a suit pitting traditional interests against non-traditional ones. And in light of upcoming changes in the makeup of the Court, this mode of analysis may see more widespread use.

## CONCLUSION

Taken together, the majority opinions express much deference for the states' protection of the marital family and affirm that the marital family model may serve as the primary framework for determining the

105. See supra text accompanying note 22.

106. See supra text accompanying notes 97-98.

107. See supra note 102.

108. See, e.g., R. McG. v. J.W., 615 P.2d 666, 670-72 (Colo. 1980); Finnerty v. Boyett, 469 So. 2d 287 (La. App. 2d Cir. 1985); see also Smith v. Cole, 553 So. 2d 847 (La. 1989); Nostrand v. Olivieri, 427 So. 2d 374 (Fla. Dist. Ct. App. 1983).

109. For a discussion of the critical distinctions between the *Michael H.* plurality's approach to natural fathers' rights and the Court's earlier approach, see supra text accompanying notes 70-72.

status of fathers. By repeated reference to the theme of states' rights and to majoritarian interests as reflected in sources of positive law, the plurality, with Justice Stevens' concurrence, concluded that the state may grant to the presumed father exclusive paternity when the child was conceived and born during the married couple's cohabitation when the legal parents wish to raise the child as their own. Yet, by reference to the natural father's individual procedural due process rights, Justice Stevens, the fifth vote of the majority, concluded that the natural father was granted an adequate hearing before a decision was reached on whether his interest justified a grant of visitation. While the plurality of four aimed to preclude any inquiry into the paternity and best interests of a child under the *Michael H.* facts, Justice Stevens stated that he relied upon that inquiry for the purpose of determining whether the state validly denied visitation by the natural father. A close reading of Justice Stevens' opinion, however, shows that it was probably enough for the trial court to have based a summary denial of visitation merely upon the legal parents' opposition to the claim.

The substantive due process analysis used by the plurality places great weight on the side of states' rights and majoritarian interests. In showing that a liberty interest is fundamental, the claimant must present positive law as evidence that his interest has been historically protected by our society. Only two Justices are committed to using this analysis in the future, but four of them used it in *Michael H.* to affirm the state's right to impose the marital presumption, and one additional Justice concurred in the result.

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